

Lyon Court
July 31 1777. 9

[LORD HAILES Reporter.]

INFORMATION

FOR THE

PROCURATOR-FISCAL of the Lyon Court,
for the Interest of the LORD LYON, King
of Arms;

AGAINST

WILLIAM MURRAY of Touchadam, Esq;

THE present Lord Lyon, King of Arms, having found, that, notwithstanding the royal authority of his Majesty, and the repeated enactments of Parliament, a shameful irregularity, as to armorial bearings, prevailed in this country, a full memorial was laid before counsel for advice, in what manner the business of his office should be conducted, so as that it might operate with due influence.

In consequence of the advice obtained, full warning was given, by advertisements in the news-papers, that the statutory provisions would be enforced, and the penalties exacted, in case of obstinate disobedience;

Wm Murray of Touchadam
Esq

24th June
1778

find that with only
can be exacted from
matriculation.

expenses now to
be lost & cost.
full expense of
extract.

disobedience; and, after a sufficient time had elapsed, it was judged necessary, that a proper example should be made.

Accordingly, Mr Murray of Touchadam, or Polmais, a gentleman of ancient family, and large fortune, was fixed on, as one who presumed to bear ensigns armorial, without paying any regard to the statutes 1592 and 1672, by which the authority of the Lyon, in matters armorial, are confirmed; and more particularly, that his arms were never matriculated in the Lyon register, in terms of the act 1672, which disregard was particularly inexcusable in a gentleman in his circumstances.

A precept, or summons, therefore, before the Lord Lyon's Court, was executed against Mr Murray, at the instance of the Procurator-fiscal of that Court, concluding for payment of the statutory penalty, and for escheat and forfeiture of Mr Murray's goods, upon which his arms were painted, or engraven, in defiance of law, and for expence of process.

In this process, appearance was made for Mr Murray; and, after various steps of procedure, the Lyon-depute, upon production of a certificate, under the hand of the keeper of the Lyon records, that no arms were entered upon record for Mr Murray, or any of his predecessors, did, on the 16th of November 1773, pronounce the following interlocutor: "The Court having considered the foregoing precept, and answers thereto given in for
Nov. 16. 1773. "the defender, with replies, together with the certificate produced for the pursuer, and duplies; in respect it is not denied
"by the defender that he bears arms; and that, by said certificate, it appears, the said arms are not matriculated in the
"Lyon records, according to law; therefore repels the defences;
"decerns in terms of the libel; finds the defender liable in the
"expence of process, and modifies the same to the sum of 1 l. 10 s.
"Sterling, besides the expence of extracting the decret; and decerns."

Mr Murray presented a bill of-advocation, which was passed, and the cause came to be litigated before the Lord Hailes, Ordinary; and, although it appears that the only point determined by the Lyon Court, and consequently advocated to this Court, was merely, whether or not Mr Murray had incurred the statutory penalty and forfeitures, it so happened, that a very wide range was taken, and a great variety of points, which the Procurator-fiscal did not consider as falling under the advocation, were treated

ed and determined. It is unnecessary to resume those various points, which have all been formerly stated to your Lordships. It is sufficient to mention, that, upon the 5th December 1776, your Lordships were pleased to pronounce the following interlocutor:

" The Lords having advised this petition, with the answers there-
 " to, they adhere to the Lord Ordinary's interlocutor reclaimed
 " against, and refuse the desire of the petition, *excepting as to the*
fees exigible on matriculation; as to which, remit to the Lord Or-
dinary, to call and hear parties procurators further thereon, and to
do as he shall see cause."

Dec. 5.

1776.

The Lord Ordinary had virtually given judgment, as to the *quantum* of those fees, by a reservation in the end of his interlocutor, in the following words: " Reserving always to the said Procurator-fiscal, to charge the said William Murray, to matriculate his armorial bearings, in the register of the Lyon Court, in terms of the statute 1672, and to pay the fees exigible from a Baron, and no more, as the said statute bears."

The Procurator-fiscal was humbly of opinion, That the said statute did not bear the fees for matriculation, exigible from a Baron; but, that the fees therein specified, were applicable only to *extracts* of arms after matriculation; and this opinion, he contended, was agreeable to reason, and the nature of the thing, and was confirmed by the usage of the Lyon office. And your Lordships, thinking that an inquiry into the usage of the office might be material in the determination of this point, made a remit to the Lord Ordinary.

On the 16th of January 1777, the Lord Ordinary made the following order: " Appoints the pursuer to give in a condescen-
 " dence of the fees in use to be paid by persons of the defender's
 " rank, for matriculation of their arms, betwixt and next
 " calling."

Jan. 16.

1777.

The Procurator-fiscal did accordingly give in a pointed condescendence, and annexed to it a list of gentlemen of the defender's rank, who had paid the fees as stated, and demanded from Mr Murray; and this, he did not doubt, would be fully satisfactory to that gentleman.

Mr Murray, it seems, conceived an erroneous apprehension, that his being singled out as an example for the exercise of the Lyon's authority, was an affront to him; but, in reality, it was the reverse; because he was singled out as a conspicuous Baron,
 whose

whose submission would convince inferior persons, that it was in vain for them to attempt to elude the law of Arms. This erroneous apprehension, however, has made Mr Murray dispute every inch of ground in the keenest manner. Instead, therefore, of being satisfied with the pursuer's condescendence, and list of instances, he gave in answers, objecting to the condescendence, and insisting for inspection of the books of the Lyon Office.

The Lord Ordinary appointed another condescendence to be given in, specifying the dates of the examples produced ; and also appointed the pursuer to set forth, whether he had any objection to the inspection demanded.

Another condescendence was accordingly given in, and the dates of the examples were accurately specified ; from which it appeared, that the fees demanded from Mr Murray were established by the usage of office, for a series of twenty years, which the pursuer humbly apprehended to be quite sufficient ; and he did certainly object to the inspection craved, as he did not think it incumbent upon him to lay open the whole business of the office to any private gentleman whatever, especially to one so much disposed to cavil, as this defender had shewn himself to be.

June 23. 1777. This additional condescendence was followed with answers and replies ; and, on the 23d of June 1777, the Lord Ordinary was pleased to make the following order : " In respect, the instances " condescended on by the pursuer, do not, in the opinion of the " Lord Ordinary, apply to the case of Mr Murray of Touchadam, " defender, the Lord Ordinary appoints the pursuer to lodge a " more special condescendence, and that betwixt and ten days " from the date hereof."

July 3. 1777. The pursuer could not condescend more specially than he had already done ; and, therefore, he enrolled the cause before the Lord Ordinary : And, at a calling on the 3d of July 1777, he set this forth, and craved his Lordship to give judgment in the cause, as it then stood. To this request no objection was made on the part of Mr Murray the defender. The Lord Ordinary was then pleased to pronounce the following interlocutor : " The Lord Ordinary, in " respect of what is above set forth, makes *avisandum* to the " Lords with the condescendence for the pursuer, and answers " thereto, additional condescendence for the pursuer, answers to " said additional condescendence and replies ; and appoints both parties

*2 July 30,
with money*

“ parties to prepare, and give in informations thereupon, betwixt
“ and this day se’ennight.”

In obedience to his Lordship’s appointment, this information is humbly offered on the part of the Procurator-fiscal of the Lyon Court, the pursuer in the cause. And the pursuer shall, *first*, consider the clause in the act of Parliament 1672, upon which the defender pleads, as entitling him to matriculation, upon payment of a mere trifle; and, *2dly*, shall consider the usage of the Lyon Office as explanatory of the clause in the act of Parliament; or, even upon supposition that the clause were to be interpreted as the defender wilhes, as tending to the establishment of a higher rate of fees, suited to the difference of the times, in the same manner as usage has done in all the other public offices in this country.

In the *first* place then, your Lordships will be pleased to attend to the clause in the act of Parliament 1672, which is in the following words: “ That the Lyon King of Arms may distinguish the said
“ arms, with congruent differences, and may matriculate the
“ same in his buiks and registers, and may give arms to virtuous
“ and well-deserving persons, and extracts of all arms, expressing
“ the blazoning of the arms, under his hand and seal of office,
“ *for which* shall be paid to the Lyon the sum of 20 merks by every
“ Prelate and Nobleman, and 10 merks by every Knight and Baron,
“ and 5 merks by every other person bearing arms, and no
“ more.”

Mr Murray has all along strenuously contended, That the words “ for which,” in this clause, refer to all the different particulars, viz. distinguishing arms, matriculating the same, giving arms, and, lastly, giving extracts; and he insists that your Lordships should find, That the small fees, mentioned in the statute, are all the dues that the Lyon Office can demand for any, or for all of the particulars specified, however different in importance to the private parties, and trouble to the Office.

But the pursuer flatters himself, that your Lordships will not put so very narrow a construction upon the words of the Legislature; for, it will be observed, that distinguishing and matriculating the arms of persons, who had been in practice of bearing arms before the act 1672, is evidently one branch of the business of the Lyon Office—giving arms to virtuous and well-deserving persons is another—matriculation is another—and giving ex-

tracts of all arms, expressing the blazoning of the arms, under the Lord Lyon's seal of office, is another branch of the business.

Mr Murray, therefore, must maintain, as, indeed, he has not scrupled to do, that the inconsiderable sums, prescribed to be paid, must, under the relative "*for which,*" be understood to apply to all the different branches of business; or otherwise the pursuer's interpretation must hold good, *viz.* That extracts only are meant to be taxed.

And it is submitted to your Lordships, if, in sound sense and reason, or according to analogy with any thing similar, the Legislature ever could intend to disregard all proportion between the importance and trouble of the business, and fees exigible for its being done: For your Lordships must be sensible, that, to distinguish arms with congruent differences; to give arms, or construct original coats armorial; nay, to matriculate arms, that is to say, to enter them in the register with their blazonings, properly expressed in terms of art, are all and each of them operations which require attention and skill in different degrees; whereas the mere copying of an entry of arms, or extracting it out of the register, is a simple operation, which can be performed by any man: And, surely, to put all those pieces of business upon the same footing as to dues of office; nay, to maintain, that a person may have them all performed for no higher fees than what are exigible for a simple extract, could never be the intention of a wise statute.

The Scots acts of Parliament are very different from the modern British statutes; for, instead of abounding with a superfluity of phrases, by way of making sure of comprehending the intention, they are exceedingly concise: But, however great their merit may be in this respect, it must be acknowledged, that, in some instances, we may apply to them the saying, *Brevis esse laboro, obscurus fio.*

The brevity of the clause in question has, with submission, given rise to the present dispute on the part of Mr Murray; for, had not the act of Parliament trusted that the relative *for which,* would, according to good grammar, as well as sound sense, and the reason of the thing, be unquestionably understood as applicable only to the branch of business immediately preceding; the clause would, no doubt, have run thus, *for which extracts shall be paid.*

But,

But, with submission, the Legislature could never apprehend, that it could be supposed, that the small fees specified to be paid for extracts, fees which, your Lordships will observe, were inconsiderable at the time the act were passed, were applicable to all and each of the various branches of the business of the Lyon Office, in matters armorial. The Legislature meant only to fix the rate of extracts, as is usually done upon different occasions in modern acts of Parliament; but the fees exigible for the performance of the other well-known operations of the Lyon Office, were left to that usage by which they could be best ascertained.

The pursuer, therefore, flatters himself, that your Lordships will be of opinion, that the small fees mentioned in the act of Parliament, in which fees themselves too, a distinction is made as to persons of different ranks, do refer only to extracts of arms, and are by no means applicable to the other branches of the business of the Lyon Office; and consequently, that Mr Murray is not entitled to have his arms matriculated, upon payment of ten merks, and no more.

If the pursuer shall be successful in the argument which he has maintained against Mr Murray's interpretation of the act of Parliament 1672, the usage of the Lyon Office will not have so much to do, as if Mr Murray's interpretation should receive the sanction of this Court; but, at any rate, the pursuer must beg leave to enter a caveat against a fallacious mode of reasoning assumed by Mr Murray, before the Lord Ordinary. For, Mr Murray has thought proper to reason upon a *petitio principii*; that is to say, he has assumed it as a fixed proposition, That the act of Parliament 1672, has expressly enacted, That ten merks, and no more, shall be paid by a Baron for matriculation; and he then contends, that an express act of Parliament cannot be repealed; by the usage of any office whatever; and that, therefore, the usage of the Lyon Office, in exacting higher fees than what is specified in the act of Parliament, must be held as no better than illegal extortion. Such a mode of reasoning will have no impression upon your Lordships, because the interpretation of the act of Parliament is, at least, *ad hoc sub judice*.

The pursuer shall now proceed, in the *second* place, to consider the usage of the Lyon Office as explanatory of the clause in the act of Parliament; or even although the clause should be understood as fixing the fees in 1672, as tending to the establishment of a higher

higher rate of fees, suited to the difference of the times, in the same manner as usage has done in all the other public offices in this country.

And, however much Mr Murray may affect to complain, that the pursuer has not condescended sufficiently, with respect to the usage of the Lyon Office, the pursuer is humbly hopeful, that your Lordships will be of a different opinion; and, in these hopes, he shall lay before the Court the substance of the two condescendences which he has exhibited before the Lord Ordinary.

He has then condescended, " That when the arms of gentlemen
" of the defender's rank are matriculated in the records of the
" Lyon Office, with supporters, whether such persons, or their
" predecessors, have been in use to carry these supporters before
" said matriculation or not, the lowest fees paid by the person so
" matriculating, so far as the pursuer knows, (except in the special
" cases, where there has been a former matriculation of the
" same person's arms without supporters, or where the grant of
" supporters has been obtained directly from the King), were always
" above 28 *l.* Sterling; and, for some time past, the stated
" regulated fees, payable upon such occasions, have been as follows, *viz.*

" To Lord Lyon,	.	.	.	<i>L.</i> 21	0	0
" Depute,	.	.	.	3	3	0
" Clerk,	.	.	.	2	2	0
" Keeper of the record, and Depute-clerk,	.	.	.	1	1	0
" Seal, painting, and vellum,	.	.	.	1	14	0
" White-iron case,	.	.	.	0	1	6
In all				<i>L.</i> 29	1	6

And, in confirmation of this, the pursuer has exhibited, before the Lord Ordinary, the following list of gentlemen of the defender's rank, with the dates of their matriculation, *viz.*

Sir John Gordon of Invergordon, Bart.	April 23. 1756.
Sir John Sinclair of Murkle, Bart.	Nov. 10. 1767.
Sir Alexander Purvis of Purvis, Bart. chief of the name.	Oct. 12. 1772.
Archibald Douglas of Douglas, Esq;	May 20. 1771.
	Hugh

Hugh Seton of Touch, Esq;	April 29. 1771.
Robert Campbell of Finab, Esq;	July 30. 1772.
Patrick Heron of Heron, Esq; chief of the name,	Feb. 16. 1767.
John Macleod, Esq; representative of the Lords of the Lewis,	March 17. 1762.
Alexander Chisholm of Strathglafs, Esq;	May 25. 1761.
Archibald Hamilton of Dalziel, Esq;	August 1. 1759
James Denniston of Colgrain, Esq; representa- tive of the Lords of Denniston,	Dec. 5. 1771.

All and each of these gentlemen, as well as many others whose names might also be mentioned, did, at matriculation of their arms, make payment of the full fees before expressed, at least all of them of above the sum of 28 *l.* Sterling, as aforesaid.

Here then your Lordships have a series of the usage of office for upwards of twenty years, establishing a rate of fees very different from those mentioned in the act of Parliament; and the pursuer has full confidence in the wisdom and candour of your Lordships, that you will follow the same rule of judging, with regard to the fees of the Lyon Office, as to the fees of any other office in the kingdom. It is well known, that the fees of all the different offices have been, in progress of time, augmented by usage, even when their extent was clearly fixed by statute. Your Lordships will recollect many instances, falling under your own immediate department, to which the Court has given its sanction, *ex equitate*; for, by the lapse of even a short space of time, the price of every thing is so much heightened, that fees, which were reasonable at a more remote period, are found to be altogether inadequate to the purpose for which they were at first allowed, *viz.* the decent maintenance of those who are employed in the execution of business.

Supposing, therefore, the act of Parliament should be understood by your Lordships as express, with regard to the fees of the Lyon Office, not only for extracts, but for every other part of the business of that office, in matters armorial, the pursuer would, with great submission, think himself well entitled to plead upon the general rule in such cases, that usage should be held sufficient to enlarge the dues: And truly, there can be no method so unexceptionably just for ascertaining the dues of any office as usage, because that, is the gradual operation of reason and experience, upon

on the justice of which we can more certainly rely, than upon any positive enactment whatever, framed with a view to futurity.

The defender has thought proper to object to some of the instances quoted from the Lyon-records, of gentlemen of the same rank with himself, who have paid the stated fees for matriculation. He has objected to Mr Douglas of Douglas, Mr Seton of Touch, and Mr Campbell of Finab, upon very nice and critical ground, such as, that neither of these gentlemen are in possession of a right to carry arms and supporters, flowing from a period prior to the statute 1672, of which right Mr Murray boasts.

But, with submission, it cannot be contraverted, that these gentlemen, as well as Mr Murray, are the representatives of ancient and respectable families; and consequently, he cannot deny, that they are of the same rank with himself; and, if they, and other gentlemen standing upon that general line of distinction, have uniformly, and without the smallest grudge or controversy, paid the stated fees, there does not seem to be any good cause for making Mr Murray an exception, or for holding, that the usage is not well enough established to be effectual as to him also. Indeed, the pursuer cannot help thinking it beneath a gentleman, who has the blood in his veins of which Mr Murray boasts, to trouble your Lordships with an altercation as to the extent of the usual fees paid for recording his honours.

Mr Murray has pointed at a very extraordinary rule of determination, *viz.* That the fees paid recently after the act 1672, should be certified authentically, and serve as an example for regulating the fees now to be paid.

But Mr Murray must be very sensible, that the precise fees paid recently after the statute 1672, cannot now be ascertained, there being no evidence as to fees so far back preserved in the Lyon Office. At any rate, your Lordships surely would never be of opinion, that the usage of so very distant a period should be followed at this time of day, the Legislature having left the fees of the office to be settled by usage, according to the progression of time in every respect: That is to say, allowing all concomitant circumstances to have their natural influence. It is, with all due deference, plain, that modern usage, as fixed by the uniform acquiescence of twenty years, must be the rule. Indeed, the pursuer may

may venture to affirm, that, even supposing the fees which have been uniformly paid in the Lyon Office for these twenty years past, should be understood as an augmentation, the same thing has been confirmed in other offices, upon the strength of a much shorter usage: And these fees, after all, are by no means so high as in other countries, particularly in the neighbouring country of England, where, the pursuer is well informed, there is no warrant for arms granted in any case under 40 *l.* Sterling.

One thing likewise is of considerable importance for your Lordships to have in view, which is, That there is not a single instance to be found, where, except for extracts only, the small fees mentioned in the act 1672, have been received for matriculation. This is real evidence in favour of the regulated fees of the office, as established by usage; for, as the small fees mentioned in the act of Parliament have never been, so far as appears, the rule of payment for the matriculation, or the original construction of the arms or armorial bearings, there is nothing else by which the rate of payment can be established but usage.

This usage, the pursuer humbly apprehends, he has sufficiently established by the series of instances for twenty years, which he has exhibited; of the authenticity of all and each of which, the defender, if he entertains the least doubt, may easily satisfy himself. And, however your Lordships may have been disposed to a restriction of the authority of the Lyon Court, as to its jurisdiction in inflicting penalties, the pursuer trusts that your Lordships, will give a more liberal determination as to the fees of office, than this defender Mr Murray seems to expect.

It has been alledged by the defender, That the pursuer never informed the defender of the precise extent of the fees asked for matriculation of his arms, but declared, that the Lord Lyon was resolved to try the point of right, so that this case might be a leading card for others. The pursuer trusts more to the known candour of the defender's agent, from whom it is supposed this allegation comes, than to suppose that any undue impression is meant to be conveyed by it. The fact is, that Mr Murray did, all along, both publicly and privately, so far as the pursuer knows, insist, (as he still does) that he would pay no more than the small fees mentioned in the act of Parliament; and whatever *a la volée* words may have passed,

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JAMES BOSWELL.